No. 80-195

IN THE

Supreme Court of the United States

October Term, 1980

METROMEDIA, INC.,

Appellant,

vs.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, Inclusive,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.,

Appellant,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

Brief in Support of Jurisdictional Statement Filed by Amici Curiae Who Rely on Outdoor Advertising to Communicate.

ANTHONY MICHAEL GLASSMAN,
GLASSMAN & BROWNING,
360 North Bedford Drive,
Suite 204,
Beverly Hills, Calif. 90210,
(213) 878-1600,
Attorneys for Amici Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

No. 80-195

IN THE

Supreme Court of the United States

October Term, 1980

METROMEDIA, INC.,

Appellant,

vs.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, Inclusive,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.,

Appellant,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Appellees.

Brief in Support of Jurisdictional Statement Filed by Amici Curiae Who Rely on Outdoor Advertising to Communicate.

QUESTION PRESENTED

Does the First Amendment to the Constitution of the United States permit the elimination of the medium of communication by signs?

AMICI CURIAE PARTICIPATING HEREIN

American Advertising Federation
American Association of Advertising Agencies
California Avocado Commission
California Motel Association
California Museum Foundation of the California Museum of Science and Industry
Certified Grocers of California, Limited
Council for Peace and Equality in Education
County of Los Angeles, Office of the Sheriff
Glendon Craig, Commissioner California Highway Patrol
John Duffy, Sheriff of San Diego County
Family Theater Incorporated
First Church of God
Knights of Columbus, Southern California Chapter
Las Vegas Convention and Visitors Authority
Jerry Lench
Los Angeles Police Protective League
Service Corps of Retired Executives
Sickle Cell Anemia Research & Education, Inc.
Southern California Broadcasters Association, Inc.

TABLE OF CONTENTS

Page

Question Presented i

Amici Curiae Participating Herein ii

Statement of Interest 1

Argument 10

Summary of Argument 10

I.

Outdoor Advertising Is a Unique Medium 11

II.

The San Diego Ordinance Broadly Discriminates Against Certain Types of Messages 12

III.

The Prohibition Is Total; Its Scope Is Absolute 14

IV.

The "Time, Place and Manner" Formula Is Not Applicable 14

V.

Outdoor Advertising Is a Reasonable Method of Communication in the Areas and Under the Circumstances in Which It Is Conducted 15

VI.

The Burden of Justifying the Prohibition Was Lifted From the City and the Burden of Disproving the Justification for the Restriction Was Placed on Appellants 16

Conclusion 18

TABLE OF AUTHORITIES

Cases — Page

Adderley v. Florida, 385 U.S. 39 (1966) 15

Carey v. Brown, 48 L.W. 4756 (June 20, 1980) 13, 17, 18

Central Hudson Gas & Electric Corporation v. Public Service Commission, 100 S.Ct. 2343 (1980) ... 14, 17

Cohen v. California, 403 U.S. 15 (1971) 14

Consolidated Edison Co. v. Public Service Commission, 100 S.Ct. 2326 (1980) 17

Cox v. Louisiana, 379 U.S. 559 (1965) 15

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 13, 17

Grayned v. City of Rockford, 408 U.S. 104 (1972) 15, 17

Kovacs v. Cooper, 336 U.S. 77 (1949) 15

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 16

Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) 13, 15, 17

Rowan v. Post Office Dept., 397 U.S. 728 (1970) ... 15

Saia v. New York, 334 U.S. 558 (1948) 15

Spence v. Washington, 418 U.S. 405 (1974) 14

United States v. O'Brien, 391 U.S. 367 (1968) 17

Constitution

United States Constitution, First Amendment ..... i, 18

Miscellaneous

San Diego, California City Ordinance No. 10795 (N.S.) 1, 12

STATEMENT OF INTEREST

These amici curiae have joined together to present this brief because of the severe restriction which the City of San Diego has imposed on their ability to communicate. Amici are representative of the large number of individuals and organizations who use outdoor advertising in California and throughout the nation to convey information to the public. For some amici and for some messages, alternative means of communication are inadequate. For other amici, there is simply no meaningful alternative.

Unless this Court strikes down the challenged ordinance, the ability of amici to communicate in San Diego will be seriously impaired. Furthermore, since the decision of the California Supreme Court establishes a precedent which will allow other cities and counties within the State of California to enforce existing ordinances of similar effect, and other cities and counties in California to adopt and enforce new ones, the restraint on communication in San Diego has statewide implications.

The only meaningful use of signs permitted under San Diego's Ordinance No. 10795 (N.S.) is by owners of land who wish to sell or rent that property or identify a business or activity conducted on that land. The types of information which these amici wish to continue disseminating in San Diego and elsewhere cannot be adapted to the narrow, landowner oriented, exceptions tolerated by San Diego's ordinance. The medium through which they have chosen to communicate with the public in the past will be eliminated by the San Diego ordinance. Other media are unsuitable, inefficient or prohibitively expensive.

The following is a brief statement identifying the individuals and organizations filing this brief and describing their respective uses of outdoor advertising.

The AMERICAN ADVERTISING FEDERATION is a national trade association. Its membership includes pro-

ducers and sellers of consumer products and services, advertising agencies, magazine and newspaper publishers, radio and television broadcasters and networks, outdoor advertising associations and various other media companies and groups. Also included in the membership are 24 other trade associations and 193 local advertising clubs and federations throughout the United States which have a combined membership of over 20,000 advertising practitioners.

The members of the American Advertising Federation utilize outdoor advertising for a wide variety of messages. Each distinct medium of communication has individual, unique and peculiar characteristics and no particular medium can satisfy every communication need. Outdoor advertising has special advantages in introducing new products, establishing name recognition, conveying point of sale information and directing consumers to sales outlets. Outdoor advertising is particularly important for smaller businesses with limited advertising budgets which preclude utilization of the more expensive mass media. Outdoor advertising enables a small business to portray a message on a sign which can appear as impressive as that of a larger business. The same is rarely true for television, radio or magazines where production costs are much higher. Outdoor advertising is a particularly effective medium in tailoring a message to the specific geographic and/or demographic market desired.

The AMERICAN ASSOCIATION OF ADVERTISING AGENCIES is a national trade organization. Its membership represents 75 percent of all advertising agency business in the United States. Its members utilize outdoor advertising for all types of advertising campaigns for national, regional and local advertisers. Outdoor advertising is often selected as the only means of transmitting a message to the public. Often it is utilized in conjunction with other media in campaigns in which the specific message in one medium will supplement or complement the message in the other. Cost

is frequently a consideration in selecting outdoor advertising because it is a substantially less expensive medium for reaching large numbers of persons.

The CALIFORNIA AVOCADO COMMISSION is a corporation created by the California State Legislature, financed by approximately 8,500 California avocado growers, to promote the growth and welfare of the avocado industry. It represents California avocado growers in the areas of advertising, research and government relations. The Commission regularly uses outdoor advertising to encourage consumption of avocados. Outdoor advertising has proved to be particularly effective in conveying suggested uses for avocados in a colorful, graphic and appetizing fashion. The Commission has also discovered that by including the names of individual retailers located in the vicinity of the sign, it has been able to achieve highly successful special promotions.

The CALIFORNIA MOTEL ASSOCIATION is a trade association consisting of motels throughout the State of California. Outdoor advertising enables member motels to inform the traveling public of their existence, facilities and locations. This advertising is particularly important to independent, non-chain motels which cannot build name identity through broad-based national or regional advertising campaigns. Other media cannot substitute for outdoor advertising because tourists generally select their lodging before they are exposed to other media and because no other medium can come close to reaching the same percentage of persons who are actually using the roadways in the geographic vicinity of a motel and who are then in the market for lodging.

The CALIFORNIA MUSEUM FOUNDATION OF THE CALIFORNIA MUSEUM OF SCIENCE AND INDUSTRY is a private organization which raises funds from the public to support the museum. The museum receives 75% of its funding from the Foundation and the other 25% from

the State of California. Approximately 3,000,000 people visit the museum and attend its scheduled programs annually. Because of the large number of temporary exhibits and programs at the museum, the museum must be able to inform the public of current exhibits and programs. The museum relies on outdoor advertising to do so because of its low cost, its capacity for disseminating current information and its ability to reach tourists who may have limited access to other media.

The CERTIFIED GROCERS OF CALIFORNIA, LIMITED is a retailer-owned food wholesaler which operates as a cooperative buying and distributing organization for approximately 4,000 retail outlets. The organization supplies over 25,000 consumer items to member stores, including products under labels controlled by the Association. These controlled label products are basic to the ability of the member stores to compete with national and regional chains which spend huge sums to advertise their private labels. Because of the disparity in advertising budgets, outdoor advertising is vital to the ability to compete with the private labels of chains. This association's budget is only 20 percent of what some chains spend for television advertising alone. Because of outdoor advertising's high value per dollar, the organization spends approximately 75 percent of its advertising budget for outdoor advertising. The balance is spent on radio advertising so as to provide a complementary combination of audio and visual exposure.

The COUNCIL FOR PEACE AND EQUALITY IN EDUCATION was formed in 1977 by a group of business and professional leaders in the Los Angeles area to support peaceful implementation of a school desegregation program. The group took a neutral stance on the issue of mandatory busing in order to provide an organization in which individuals of all viewpoints could join together to urge that the law be obeyed and that the court plan, regardless of content, be peacefully implemented. The Council sought public ser-

vice space from the various media, including television and radio, but were rejected by all but outdoor advertising. Broadcasters expressed concern over the "controversial" nature of the proposed messages. The outdoor advertising industry, on the other hand, provided 100 signs throughout the City of Los Angeles (90 in English and 10 in Spanish), which attracted considerable attention to the Council's efforts. This attention was increased when radio and television stations, which had denied the request for public service coverage, gave news coverage to the billboard campaign. Television stations even showed pictures of the billboards during their news programs.

The COUNTY OF LOS ANGELES, OFFICE OF THE SHERIFF; GLENDON CRAIG, COMMISSIONER, CALIFORNIA HIGHWAY PATROL; JOHN DUFFY, SHERIFF, SAN DIEGO COUNTY; and LOS ANGELES POLICE PROTECTIVE LEAGUE are representative of agencies and individuals charged with law enforcement in the cities and counties and on the state and federal highways of California. Each of these amici has, like many other law enforcement agencies in the State of California, utilized outdoor advertising as an aid in law enforcement and traffic safety programs. Examples include encouraging the use of seatbelts (see Appendix I to Appellants' Jurisdictional Statement), adherence to the 55-mile-per-hour speed limit (*Id.*), as well as crime prevention programs, reward posters and a variety of other law enforcement messages. Law enforcement officers have also used outdoor advertising to publicize labor disputes (*Id.*). Additionally, outdoor advertising has been utilized for recruitment purposes, particularly minority recruitment, because of the ability of outdoor advertising to focus its coverage on those geographic areas most heavily populated by minority groups. No other medium can adequately replace outdoor advertising in reaching motorists with traffic safety messages because they see those messages while they are actually driving. Amici would neither utilize

outdoor advertising nor participate in this brief were they not convinced, based upon their experience and responsibilities in the area of traffic safety, that there is no evidence to support the conclusion that outdoor advertising constitutes a traffic hazard.

FAMILY THEATER PRODUCTIONS is an organization which was formed by the Reverend Patrick Peyton to promote family prayer. Since 1956, the organization has utilized outdoor advertising to proclaim a variety of religious messages generally linked to the organization's slogan, "The Family That Prays Together, Stays Together." Over the last four years, this organization has used outdoor advertising space with a value of nearly $1,800,000, representing approximately 3,000 displays each year.

The FIRST CHURCH OF GOD, located at 5856 West Boulevard, Los Angeles, California, has used outdoor advertising to draw the attention of the public to its services. In 1976, this Church used 20 billboards in the south central area of Los Angeles surrounding the Church. Response to the billboards was overwhelming and the Church has used 20 billboards on each of the two additional occasions. Newspaper advertising, in contrast, has yielded very little success. No other medium is as ideally suited to serve the communication needs of the Church. Outdoor advertising can direct the message exclusively to the geographic area in which the Church is located and can reach virtually everyone who goes outdoors in that area. Approximately 40 percent of the present congregation was first made aware of the Church and its services through the billboard advertising.

The KNIGHTS OF COLUMBUS, SOUTHERN CALIFORNIA CHAPTER, is a fraternal organization of Catholic men. The Chapter has 88 councils with a total of 19,000 members. Each year at Christmas time, the Chapter communicates a "Christ in Christmas" message to the public through the use of a large number of outdoor advertising displays. Other media are not as affordable and do not create

the same public impact for the message. Outdoor advertising is effectively the only medium available to the Chapter to communicate its Christmas message to the public at large in Southern California.

The LAS VEGAS CONVENTION AND VISITORS AUTHORITY seeks to promote the tourist and convention business of the City of Las Vegas, Nevada. In 1980 alone, the organization will spend approximately $368,000 on outdoor advertising in the Southern California area (from which 38 percent of all visitors to Las Vegas are drawn).

JERRY LENCH is a consultant with Jerry Lench & Associates. In 1973, Mr. Lench was responsible for advertising and public relations activity during a strike by the Oil, Chemical & Atomic Workers International Union against the Shell Oil Company. On behalf of the Union, Mr. Lench sought to convey a "Don't Buy Shell!" message to the public at large. He approached and was rejected by every other medium of mass communication. The Union message, which was carried on outdoor advertising (*Id.*), could not have been communicated to the public at large in any medium of mass communication had it not been for outdoor advertising.

The SERVICE CORPS OF RETIRED EXECUTIVES is an organization comprised of retired business executives. The Corps, which is sponsored by the Small Business Administration and the City of Los Angeles, assists businessmen trying to get started, experiencing problems or trying to expand. Advertising the Corps on outdoor advertising has helped to create name identification and a positive image which has been of great benefit to the organization. When the Corps' message is posted on outdoor advertising displays, the Corps immediately receives hundreds of telephone calls inquiring about the availability of its services. The results from outdoor advertising have been far better than other media, particularly newspapers and handbills which have created very few inquiries.

SICKLE CELL ANEMIA RESEARCH & EDUCATION, INC. was organized in September, 1971 to educate the public about and to perform research into Sickle Cell Anemia. The organization faced initial difficulties because of questions regarding government participation and the absence of financial assistance from large charitable organizations. The community at large was skeptical because there had been a number of fraudulent fund raising efforts in the name of Sickle Cell Anemia. The organization approached all of the media for assistance and was turned down by every medium except outdoor advertising. In 1973, because of a major billboard campaign, almost $100,000 was received in contributions. The organization started to move forward, citizens began to support the organization and other media became interested and began to provide coverage. The organization now has an extensive program of testing citizens for Sickle Cell Anemia and educating the community at large about the disease, in addition to continuing research to learn more about the disease. The organization continues to utilize outdoor advertising.

The SOUTHERN CALIFORNIA BROADCASTERS ASSOCIATION, INC., which was organized in 1937, has a current membership of 150 radio stations and 21 television stations throughout the Southern California area. The members of the Association use outdoor advertising to communicate with their listeners and viewers. Outdoor advertising enables radio stations to direct motorists' attention to the call letters of a specific station during so-called "drive time," which is a prime period for radio audiences. For radio and television stations, outdoor advertising is one of the most effective means of informing the viewing public of programming or format changes. Outdoor advertising can be concentrated on viewers and listeners within the area of a broadcast signal. Since it is difficult for broadcast media

to increase their audiences through the use of other broadcast media, a non-broadcast medium such as outdoor advertising is extremely important.

ARGUMENT.

SUMMARY OF ARGUMENT.

The immediate question before this Court is whether a substantial federal constitutional question is raised by the prohibition of all "off-site" sign structures located on private property which are used for the display of lawful commercial and non-commercial messages to members of the general public traveling on the public streets and highways. The answer to that question is exceedingly important to the organizations which have joined together to file this brief.[1] The decision from which the appeal has been taken permits an egregious invasion of the constitutional rights of these amici as well as appellants. Their most important method of communication with the public is threatened with extinction.

These diverse amici share a single unifying characteristic: They use and rely upon outdoor advertising to transmit messages to the public. They are representative of those whom the stipulated facts recognize as dependent upon outdoor advertising because it is the most suitable, affordable, accessible, efficient, or effective medium (A. 123a-126a, JS 22, 23, 28)[2]

Outdoor advertising is a distinct and unique medium of communication. The effect of the San Diego ordinance is to destroy it and to confine communication by sign to property identification. The ordinance, with insignificant exceptions, denies everyone the right to "advertise" by sign in San Diego. The system which enables persons to purchase

---

[1]Written consent to the filing of this amicus curiae brief by the parties to this litigation is being filed with the Clerk of the Court simultaneously herewith.

[2]References to "A. ...." are to the appropriate pages of the Appendix to Appellants' Jurisdictional Statement. References to "A. ...., JS ...." are to the appropriate pages of the appendix and paragraph numbers of the Joint Stipulation of Facts set forth at pages A. 119a through 127a (Appendix H) of the Appendix to the Jurisdictional Statement.

sign space for communications will be dismantled and destroyed. While the California Supreme Court has hinted that these amici and other advertisers might retain the ability to "assert" that the San Diego ordinance "cannot constitutionally *be applied* to prevent" them from using billboards to proclaim their messages (A. 23a, n.14, Court's emphasis), this is a meaningless right if the signs no longer exist. Individual advertisers cannot *create* anew a network of signs whenever they have a message to transmit. San Diego's wanton destruction of a communications medium has been promulgated without consideration of the damage done or the valuable function of outdoor advertising, without regard to less devastating alternatives, without proof of any compelling or even substantial need, and solely because San Diego's governing council has determined that it considers signs to be unattractive.

I.

Outdoor Advertising Is a Unique Medium.

The stipulated facts reflect many characteristics of outdoor advertising which are unique and special to this medium. Certain other features are manifest from the nature of the medium. (a) The message may be placed on a specific sign or signs in a single or carefully selected group of locations. It is not necessary, as it is for users of radio, television and newspapers, to purchase the ability to communicate to an entire metropolitan community in order to reach those who are potential customers in a certain market, potential voters for a particular candidate or potential targets for a specific message. An advertiser may purchase one, ten, one hundred or any other number of signs depending upon his peculiar needs. (b) The message must of necessity be simple and direct. Expensive production facilities are not necessary. There are no broadcast facilities and licenses or printing presses to support. (c) The message may be seen by members of the public repeatedly during a particular

month — as often as a member of the desired audience traverses a particular location or locations every month. (d) The message may be dramatic, memorable, colorful and out-of-doors. (e) The message requires virtually no effort or time to be seen and remembered. (f) Once posted, the message does not require any human participation in disseminating the message. Unlike leaflets, no one needs to be available to pass it out to every individual member of the audience. (g) The message can reach thousands of persons per hour and tens of thousands of persons per day. It is genuinely a mass medium.

II.

The San Diego Ordinance Broadly Discriminates Against Certain Types of Messages.

San Diego Ordinance No. 10795 (N.S.) defines its purposes[3] (A. 106a-107a) partially in terms of eliminating excessive, confusing or hazardous displays. However, since *all* outdoor advertising displays, as that term is defined in the stipulated facts (A. 123a-126a, JS 21, 22, 23, 24, 25), are eliminated by the ordinance (A. 120a, 126a, JS 2, 29), and the ordinance makes no effort to address itself to any sign which might actually be hazardous, excessive or confusing, the other objective articulated in the "Purpose and Intent" portion of the ordinance stands revealed as the true

---

[3]As discussed in greater detail, *infra*, the City of San Diego offered *no* evidence of the objectives sought to be achieved by the ordinance other than the preamble to the ordinance and *no evidence whatsoever* with respect to whether the ordinance would achieve its stated objectives or whether those objectives could be achieved with less draconian measures.

goal of the ordinance.[4] The "purpose", as plainly stated, is the improvement of aesthetic qualities in San Diego. The method by which the ordinance seeks to achieve this goal is the elimination of signs as "advertisement" and the restriction of signs to "identification". (A. 106a.) Thus, the ordinance prohibits signs which are vehicles for the communication of all messages except those which identify or relate to the occupant of the land on which it is located.[5] And, the only persons who can use signs to communicate a message are those who not only own land but have a business on it which they wish to identify in some way. A non-land owning person with a message must resort to either a more expensive medium or a more primitive one — at immeasurable and varying cost to the effectiveness of the message.

Simply stated, in order to improve the City's appearance, San Diego will no longer allow a person to communicate a message intended to persuade, convince, entice, encour-

---

[4]Divining the actual objective of an ordinance as opposed to the purported purpose by considering what it embraces and what it has chosen not to embrace is a process frequently undertaken by this Court. For example, in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977), the Court was able to discern that the ordinance was not genuinely concerned with the place or manner of speech, because similar types of signs in similar locations were not prohibited. Similarly, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975), the Court was able to determine that the regulation was not aimed at traffic safety, because the prohibition was both overinclusive and underinclusive for that purpose. San Diego's ordinance is similar as far as traffic safety is concerned. It is not limited to signs which might be dangerous to motorists. On the other hand, it does not address "on-site" signs which might present hazards. *See also: Carey v. Brown*, 48 L.W. 4756 (June 20, 1980). "The apparent over- and underinclusiveness of the statute's restriction would seem largely to undermine [the] claim that the prohibition . . . can be justified by reference to the state's interest in maintaining domestic tranquility." (at 4758.)

[5]That the exceptions for bus bench signs, transit vehicle signs, commemorative and governmental signs and the like (A. 110a-111a) are not meaningful is evidenced by Appellee's stipulation that its ordinance would, in fact, eliminate outdoor advertising in the City of San Diego.

age, educate or explain by fixing that message on a permanently placed sign. While considerably more severe in its impact, San Diego's prohibition is somewhat reminiscent of the restriction which was considered and rejected a few months ago by this Court (prohibiting "promotional", but allowing "informational" communication concerning electricity) in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 100 S.Ct. 2343 (1980). Furthermore, San Diego's ordinance bans the message simply because the form of its presentation is considered unattractive or offensive — a concept heretofore considered repugnant to the Constitution. *Spence v. Washington*, 418 U.S. 405 (1974); *Cohen v. California*, 403 U.S. 15 (1971).

III.

The Prohibition Is Total; Its Scope Is Absolute.

The issue presented by this case, of course, is not simply whether outdoor advertising displays or billboards may be eliminated in San Diego. San Diego is a large and diverse city. If it may erase the medium of outdoor advertising, every other city (or state) may do so as well. There are simply no characteristics peculiar to San Diego which would distinguish it from any other city which might desire to eliminate all billboards. Further, if the mere assertion of aesthetics is the rationale for the ordinance, as it indisputably is, and if cities may eliminate outdoor advertising from commercial and industrial districts, they may surely eliminate them from non-commercial areas. And unincorporated areas may also ban them altogether. Thus, the issue squarely presented by this case is whether the non-temporary off-site sign may be totally banned from American life.

IV.

The "Time, Place and Manner" Formula Is Not Applicable.

It is submitted that only the most awkward rationalization will tolerate the conclusion that total elimination of a sep-

arate method of communication is a time, place and manner restriction on speech. "That the proscription applies only to one mode of communication, therefore, does not transform this into a 'time, place, or manner' case." *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977). Speech by and through billboards will be permitted at *no time* and in *no place* under San Diego's ordinance. The outdoor advertising "manner" of speech is to be extinguished. The "time, place and manner" rubric was fashioned and has been applied to rationalize minor restrictions on speech which do not prohibit or seriously impede the transmission or receipt of the message. It has been held to authorize limits on overamplified loud speakers (Compare *Kovacs v. Cooper*, 336 U.S. 77 (1949) with *Saia v. New York*, 334 U.S. 558 (1948)), and precise and narrow limits on demonstrations in and around jails (*Adderley v. Florida*, 385 U.S. 39 (1966)), schools (Compare the two ordinances considered in *Grayned v. City of Rockford*, 408 U.S. 104 (1972)), in courtrooms (See *Cox v. Louisiana*, 379 U.S. 559 (1965)), and to authorize narrow restrictions on public access to private homes (*Rowan v. Post Office Dept.*, 397 U.S. 728 (1970)). This Court has *never* held that what amounts to a formula for balancing can authorize the abrupt, mandatory cessation of an entire manner of communication.

V.

Outdoor Advertising Is a Reasonable Method of Communication in the Areas and Under the Circumstances in Which It Is Conducted.

This Court has recently stated that "[t]he nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable.' " *Grayned, supra*, 408 U.S. at 116. Earlier, the Court noted that " '[t]he truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a

certain place you would have to know the history of the particular place.' " *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974).

This wisdom was completely ignored by the California Supreme Court. It concluded that the "distinction between prohibition and regulation in this case is one of words and not substance." (A. 15a.) Considering whether the medium should be banned in the three percent of the City where commerce and industry is permitted to take place, the California Supreme Court found that arguments concerning the difference between regulation and prohibition was "sophistry", a "mere play on words." (A. 17a.)

Hence, the stipulated facts that outdoor advertising in San Diego had been legally conducted for over sixty years, in areas of commerce and industry, adjacent to business thoroughfares and from locations on private property in zones where the City had expressly authorized signs to be erected, away from homes, and in a very small segment of the City, were ignored. Indeed such facts were considered irrelevant, sophistry. However, this Court has stated that the "reasonableness" of the restraint cannot be evaluated without considering such factors. It is plain that the California Supreme Court abdicated its responsibility to evaluate the reasonableness of the ordinance in light of the nature, history and suitability of the places where outdoor advertising is conducted in San Diego.

VI.

The Burden of Justifying the Prohibition Was Lifted From the City and the Burden of Disproving the Justification for the Restriction Was Placed on Appellants.

It is virtually impossible to find a case involving a restriction on the ability to communicate which does not discuss the responsibility of government to show that the restriction serves compelling governmental interests and that

the restraint both serves those interests and does so in the least restrictive fashion possible. The burden is on the government: "We must consider whether the State can demonstrate that its regulation is constitutionally permissible." *Consolidated Edison Co. v. Public Service Commission*, 100 S.Ct. 2326, 2332 (1980). As this Court has observed, the nature of the governmental interest which must be affirmatively established has been variously labeled as "compelling",[6] "substantial",[7] "subordinating", "paramount", "cogent", "strong" or "important". *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). Whichever verbal formula is applied however, government must establish that there is a real and important need for the restraint and justify the method selected to impose it. For example, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Court observed that the City of Jacksonville had offered "no justification" (422 U.S. at 215) for distinguishing between movies containing nudity from other movies which might arguably distract a motorist. In *Linmark, supra*, the Court noted that the Township "failed to establish" (431 U.S. at 95) that the ordinance was necessary to serve the stated need, found that the evidence did not support the Council's "apparent fears" (*Id.*) that the need existed, and that the record did "not confirm the township's assumption" (*Id.* at 95-96) that the restriction adopted would satisfactorily resolve the assumed problem. Unsupported assertions, while frequently adequate to support economic regulation against substantive due process challenges, will not serve to justify restraints on communication. " '[U]ndifferentiated fear or apprehension of disturbance' " or the " 'mere desire to avoid discomfort and unpleasantness' " (*Grayned v. City of Rockford, supra*, at 117) will not support even minor

---

[6]*Consolidated Edison Co. v. Public Service Commission, supra*, at p. 2331.

[7]*Central Hudson Gas & Electric Corp. v. Public Service Commission, supra*, at 2350.

encroachments on First Amendment liberties. "[T]he justifications . . . must be carefully scrutinized." *Carey v. Brown, supra*, at 4757.

The California Supreme Court turned this standard of proof on its head. The entire burden was placed on appellants. The Court held that appellants "have failed to prove that the Ordinance lacks a reasonable relationship to the achievement of these goals [traffic hazards, aesthetics, the protection of property values]." (A. 17a.)[8] In fact, the Court simply stated, relying exclusively on the "presumption of validity" and with complete deference to the unsupported legislative pronouncements, that "the ordinance serves significant governmental interests — promoting traffic safety and improving the appearance of the community. . . ." (A. 22a.) Adequate alternative channels of communication were *found* by the California Supreme Court to exist not only in the absence of any proof to that effect by the City of San Diego, but in direct contradiction to the agreed facts.

CONCLUSION.

These amici are representative of the actual parties whose ability to communicate will be severely abridged if this Court does not agree to consider the important constitutional questions raised by this litigation and reverse the California Supreme Court. If their means of communicating can be eliminated because its form is not pleasing to the government, without proof that it creates any damage or offends any persons, and without considering less restrictive alternatives, the First Amendment certainly provides meager

---

[8]While this statement appears in the "police power" portion of the California Supreme Court's opinion, the Court's analysis in that portion of the opinion was simply carried forward to the First Amendment section. The Court never did consider whether, under the First Amendment, the City of San Diego had established any important governmental interest which was achieved by prohibiting billboards and which could not be achieved with a more limited restriction.

protection to those who cannot afford to advertise in newspapers, magazines, radios or television.

Respectfully submitted,

ANTHONY MICHAEL GLASSMAN,
GLASSMAN & BROWNING,
360 North Bedford Drive,
Suite 204,
Beverly Hills, Calif. 90210,
(213) 878-1600,
Attorneys for Amici Curiae.